(2)

Supreme Court, U.S.
FILED
SEP 8 1993
OFFICE OF THE CLERK

No. 92-2027

In the Supreme Court of the United States

OCTOBER TERM, 1993

JOHN ROBERT WOODS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

RICHARD A. FRIEDMAN
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

15 pp

QUESTION PRESENTED

Whether this Court's decision in *Hughey* v. *United States*, 495 U.S. 411 (1990)—which held that the Victim and Witness Protection Act of 1982, 18 U.S.C. 3579, 3580 (1982 & Supp. V 1987), imposed an "offense-of-conviction" limitation on restitution orders—should be applied retroactively in this collateral challenge by petitioner, who seeks under now-superseded Rule 35, 18 U.S.C. App. (1982 & Supp. IV 1986), to correct an assertedly illegal restitution order imposed under the Federal Probation Act, 18 U.S.C. 3651 (1982 & Supp. IV 1986), repealed by the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, § 212(a)(2), 98 Stat. 1987.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Brecht v. *Abrahamson*, 113 S. Ct. 1710 (1993)	7
Callanan v. *United States*, 364 U.S. 587 (1961)	7
Davis v. *United States*, 417 U.S. 333 (1974)	5, 8
Edelman v. *Jordan*, 415 U.S. 651 (1974)	7
Griffith v. *Kentucky*, 479 U.S. 314 (1987)	6, 7
Heflin v. *United States*, 358 U.S. 415 (1959)	7
Hughey v. *United States*, 495 U.S. 411 (1990)	3-4, 9
Teague v. *Lane*, 489 U.S. 288 (1989)	5
United States v. *Brothers*, 955 F.2d 493 (7th Cir.), cert. denied, 113 S. Ct. 142 (1992)	9
United States v. *Cronin*, 990 F.2d 663 (1st Cir. 1993)	9
United States v. *DuVall*, 926 F.2d 875 (9th Cir. 1991)	9
United States v. *Stouffer*, 986 F.2d 916 (5th Cir. 1993)	9
United States v. *Woods*, 775 F.2d 82 (3d Cir. 1985)	2

Statutes and rules:

Crime Control Act of 1990, Pub. L. No. 101-647, Tit. XXV, § 2509, 104 Stat. 4863	9
Federal Probation Act, 18 U.S.C. 3651 *et seq.*:	
18 U.S.C. 3651 (1982 & Supp. IV 1986)	2, 3, 9
18 U.S.C. 3663(a)	9
Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, 98 Stat. 1976:	
§ 212(a)(2), 98 Stat. 1987	2, 3, 9
§ 215(b), 98 Stat. 2015	4

Statutes and rules: Page

Victim and Witness Protection Act of 1982, 18 U.S.C. 3579 *et seq.*:
18 U.S.C. 3579 (1982 & Supp. V 1987) 3, 9
18 U.S.C. 3580 (1982 & Supp. V 1987) 3, 9
18 U.S.C. 152 2
18 U.S.C. 1341 2

Fed. R. Crim. P.:
Rule 35 ..... 4, 6, 7
Rule 35(a) (18 U.S.C. App. (1982 & Supp. IV 1986)) .. 2, 4
Rule 35(a) (18 U.S.C. App. (Supp. V 1987), at 1298) .. 4

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-2027

JOHN ROBERT WOODS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A31-A88) is reported at 986 F.2d 669. The opinion of the district court (Pet. App. A1-A29) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 1993. Pet. App. A89-A90. A petition for rehearing was denied on March 23, 1993. Pet. App. A91-A92. The petition for a writ of certiorari was filed on June 21, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Pursuant to a guilty plea entered in the United States District Court for the Western District of Pennsylvania, petitioner was convicted on two counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to two years' imprisonment on one count and five years' imprisonment on the other count. The sentence on the latter count, however, was suspended under the Federal Probation Act, 18 U.S.C. 3651 (1982 & Supp. IV 1986), repealed by the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, § 212(a)(2), 98 Stat. 1987, in favor of a term of five years' probation. The suspension of the sentence was conditioned upon petitioner's payment of $457,338 in restitution to the victims of his fraud scheme. The court of appeals affirmed the restitution order. *United States* v. *Woods*, 775 F.2d 82 (3d Cir. 1985) (*Woods I*). Petitioner's subsequent motion under (now superseded) Fed. R. Crim. P. 35(a), 18 U.S.C. App. (1982 & Supp. IV 1986), to correct his assertedly illegal sentence was denied by the district court, and the court of appeals affirmed. Pet. App. A31-A88.

1. Between 1973 and 1980, petitioner and his co-defendant, Anthony Pivorotto, carried out a scheme to defraud the investors of the Safeguard Investment Company, which petitioner and Pivorotto jointly managed. Safeguard solicited money from numerous investors for the avowed purpose of making residential mortgage loans. In fact, petitioner and Pivorotto used the money for personal purposes and for other businesses that they controlled. As a result of their scheme, approximately 234 Safeguard investors were defrauded of more than $3 million. Pet. App. A35-A36.

2. An indictment based on the fraud scheme charged petitioner and Pivorotto in 35 counts with mail fraud, in violation of 18 U.S.C. 1341, and bankruptcy fraud, in vio-

lation of 18 U.S.C. 152. In 1985, petitioner pleaded guilty to two of the mail fraud counts, each of which concerned a specific investor, and the remaining 33 counts were dismissed. Before accepting petitioner's guilty plea, the district court told petitioner that it intended to require him to pay restitution to all the victims of the fraud scheme. Pet. App. A37.

At the subsequent sentencing hearing, the court determined that the Safeguard investors had lost $1.8 million. Pet. App. A37-A39. The court arrived at that figure by starting with the principal deposited by investors and deducting from it (1) withdrawals by investors, (2) amounts that the investors should have earned in interest, and (3) disbursements by Safeguard's trustee in bankruptcy. *Id.* at A39. After considering, among other factors, petitioner's ability to repay the Safeguard investors, the district court imposed on petitioner and Pivorotto a total restitution obligation of $989,218, of which petitioner was required to pay $457,338. That obligation was imposed under the Federal Probation Act, 18 U.S.C. 3651 (1982 & Supp. IV 1986), repealed by the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, § 212(a)(2), 98 Stat. 1987, as a condition of petitioner's receiving five years' probation in lieu of a five-year prison sentence on one of the mail fraud counts to which he had pleaded guilty. The court of appeals upheld the imposition of restitution as a condition of probation in October 1985 in *Woods I*. Pet. App. A39-A41.

3. In May 1990, this Court decided *Hughey* v. *United States*, 495 U.S. 411 (1990). In *Hughey*, the Court held that a restitution order under the Victim and Witness Protection Act of 1982, 18 U.S.C. 3579, 3580 (1982 & Supp. V 1987), is authorized only for the loss caused by the specific conduct that is the basis of the offense of conviction, and not for any injury caused by conduct beyond that on which the conviction is based. 495 U.S. at

415-422. When *Hughey* was decided, petitioner had served the two-year prison sentence that he received for one of the mail fraud counts to which he had pleaded guilty; he had served more than two years of the five-year term of probation that he received for the other mail fraud count to which he had pleaded guilty; and he had paid in full the $457,338 restitution obligation imposed by the district court. Moreover, all but $23,000 of that amount had been distributed to the victims. Pet. App. A43 & nn.3-4.

In January 1992, relying on *Hughey*, petitioner filed a motion under now-superseded Fed. R. Crim. P. 35(a), 18 U.S.C. App. (1982 & Supp. IV 1986), to vacate the restitution order to the extent that it exceeded $4758.47, the amount of loss resulting from the mail fraud offense for which petitioner received five years' probation contingent on the payment of restitution.[1] Petitioner also sought repayment of the balance of the restitution he had paid. Pet. App. A43-A44. The district court denied the motion, holding that *Hughey* should not be retroactively applied to modify petitioner's sentence.

4. The court of appeals affirmed. Pet. App. A31-A88. It determined, first, that petitioner's Rule 35 motion presented a collateral, not a direct, challenge to the restitution order. *Id.* at A50-A57. It then determined that, in addressing such challenges, this Court has articulated separate standards for retroactively applying new rules of criminal procedure, on the one hand, and

---

[1] Effective November 1, 1987, Rule 35 was amended to limit the time and circumstances in which an illegal sentence may be corrected. Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, § 215(b), 98 Stat. 2015. The version of Rule 35(a) invoked by petitioner, which provided that "[t]he court may correct an illegal sentence at any time," remains applicable to offenses committed prior to November 1, 1987, as were the offenses on which petitioner was convicted. 18 U.S.C. App. (Supp. V 1987), at 1298.

new rules of substantive criminal law, on the other hand. *Id.* at A60. It gleaned from *Davis* v. *United States*, 417 U.S. 333 (1974), the principle that new rules of substantive criminal law should apply retroactively in collateral challenges only if the claimed error involves a fundamental defect that inherently resulted in a complete miscarriage of justice and if exceptional circumstances make the need for collateral relief apparent. Pet. App. A61, citing *Davis*, 417 U.S. at 346. It gleaned from the plurality opinion in *Teague* v. *Lane*, 489 U.S. 288 (1989), the principle that new rules of criminal procedure should apply retroactively in collateral challenges only if the new rule places certain kinds of primary, private individual conduct beyond the power of criminal lawmaking authority to proscribe or requires the observance of procedures that are implicit in the concept of ordered liberty. Pet. App. A63-A64, citing *Teague*, 489 U.S. at 306. It determined that the rule announced in *Hughey* was "neither entirely substantive nor procedural, * * * but rather f[ell] somewhere in between the two." Pet. App. A68. It accordingly looked to the "common animating principles underlying" the Court's standards for applying new procedural and substantive rules retroactively. *Id.* at A69.

Applying that approach, the court of appeals held that petitioner "ha[d] not suffered the requisite miscarriage of justice" to justify retroactive application of *Hughey*. Pet. App. A71. In so holding, the court found it significant that the district court had calculated the loss caused by petitioner's fraud scheme with great accuracy, and that petitioner did not claim that the money was not owed to the Safeguard investors. Pet. App. A72-A77. In addition, the court observed that, in collecting restitution, the government was acting merely as a conduit for money for which petitioner otherwise would have been civilly liable to the Safeguard investors; thus, the restitution order, in contrast to a fine, did not directly benefit

the government. *Id.* at A77-A78. The court also took into account the unfairness of requiring the government to disgorge money that it no longer had and that petitioner probably could not have recovered from the government or the Safeguard investors in a civil proceeding for restitution. *Id.* at A78-A79.[2]

ARGUMENT

Petitioner contends (Pet. 16-38) that the court of appeals erred in treating his Rule 35 motion as a collateral challenge for purposes of retroactivity analysis and in failing to apply this Court's decision in *Hughey* to the present case. Those contentions lack merit. Moreover, they concern an issue that, in light of subsequent legislation, is of steadily diminishing importance. Further review is therefore unwarranted.

1. This Court's retroactivity analysis distinguishes between convictions that are "pending on direct review" at the time a new rule is announced and convictions that are "final" at that time. *Griffith* v. *Kentucky*, 479 U.S. 314, 321 (1987). In cases pending on direct review, new rules are always applied retroactively under *Griffith*. See *id.* at 320-328. In contrast, in cases that are "final"—*i.e.*, those in which "a judgment of conviction has been rendered, the availability of appeal exhausted,

---

[2] The government argued in the courts below that, even if *Hughey* were retroactively applicable in collateral challenges, it would be inapplicable here because (1) the restitution order in this case was imposed as a condition of probation under the Federal Probation Act, and not as part of a sentence imposed under the Victim and Witness Protection Act of 1982, as was the restitution order in *Hughey*; and (2) *Hughey* did not involve a "scheme" offense, such as the mail fraud offenses of which petitioner was convicted, which requires proof of a scheme to defraud. See Gov't C.A. Br. 13-16. The district court agreed with those arguments. Pet. App. A15-A20. The court of appeals, however, found it unnecessary to reach them. *Id.* at A45 n.5, A51 n.8.

and the time for a petition for certiorari elapsed or a petition for certiorari finally denied," *id.* at 321 n.6.—retroactive application of new rules is not automatic; rather, it is limited to the circumstances enunciated in *Davis* and *Teague*.

Petitioner's conviction and sentence, as well as the order under which he paid restitution as a condition of receiving probation instead of a prison sentence, were final at the time of this Court's decision in *Hughey*. Accordingly, petitioner is not entitled to automatic retroactivity under *Griffith*. Instead, he must satisfy the standard for retroactive application of new rules to convictions that already have become final before the new rule is announced.

Petitioner's arguments to the contrary are unavailing. Petitioner cites (Pet. 27-28) *Heflin* v. *United States*, 358 U.S. 415 (1959), for the proposition that a new rule of criminal law will be applied on a Rule 35 motion even if the case is no longer pending on direct review. He also cites *Callanan* v. *United States*, 364 U.S. 587, 589 n.3 (1961), which cited *Heflin* for that proposition. As the court of appeals observed (Pet. App. A55-A56 n.10), however, *Heflin* did not discuss the retroactivity question and, to the extent *Heflin* supported the retroactive application of a new decision in Rule 35 proceedings, it is no longer authoritative in light of this Court's subsequent retroactivity jurisprudence.[3] None of the other decisions cited by petitioner (Pet. 16-22) supports his contention that special retroactivity principles apply to Rule 35 motions.

---

[3] Because *Heflin* did not discuss the retroactivity issue, the decision does not have *stare decisis* effect on that issue. See *Brecht* v. *Abrahamson*, 113 S. Ct. 1710, 1718 (1993); *Edelman* v. *Jordan*, 415 U.S. 651, 670-671 (1974).

2. Petitioner errs in asserting (Pet. 30-38) that the court of appeals erred by applying a "heightened" *Davis* standard in determining whether to apply *Hughey* retroactively. The court of appeals did not apply a heightened *Davis* standard. Instead, it analyzed *Hughey*'s retroactivity "with a view toward the common animating principles underlying the two retroactivity doctrines." Pet. App. A70-A71. In any event, petitioner cannot meet the *Davis* retroactivity standard that he claims should have been applied in determining whether *Hughey* applies here.

In *Davis*, this Court held that a new substantive rule of criminal law should be applied retroactively to cases that were final before the new rule was announced if the claimed error constituted a fundamental defect that inherently resulted in a complete miscarriage of justice or if the case presented exceptional circumstances that made the need for collateral relief apparent. 417 U.S. at 346. Neither condition is present here.

The reasoning of the court of appeals is compelling. Petitioner does not deny that he was civilly liable to the Safeguard investors for at least the amounts they received in restitution. Moreover, the district court's acceptance of petitioner's plea to only two counts of the indictment was explicitly premised on the court's intention to require petitioner to pay restitution to all the victims of petitioner's scheme; if the court had anticipated a challenge to the restitutionary condition on probation, the court would no doubt have insisted on structuring the plea agreement in a way that would enable it to impose a requirement of full restitution that would not be subject to challenge. Under these circumstances, there is no miscarriage of justice in leaving the restitution payments undisturbed.

3. Quite apart from the fact that petitioner's retroactivity argument lacks merit, this case does not warrant

further review. The underlying issue of whether *Hughey* invalidates the restitution order in this case has no continuing importance. In *Hughey*, this Court held that a restitution order under the Victim and Witness Protection Act of 1982, 18 U.S.C. 3579, 3580 (1982 & Supp. V 1987), must be limited to the loss caused by the specific conduct that is the basis of the offense of conviction; it may not cover injury caused by conduct beyond that on which the conviction is based. 495 U.S. at 415-422. Petitioner's challenge is premised on the view that the holding of *Hughey* extends to "scheme" offenses, such as mail fraud, and to restitution orders imposed under the Federal Probation Act, 18 U.S.C. 3651 (1982 & Supp. IV 1986).[4]

The Federal Probation Act was repealed effective November 1, 1987. Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, § 212(a)(2), 98 Stat. 1987. Moreover, Congress amended the Victim and Witness Protection Act of 1982 to address the effect of the Court's holding in *Hughey*. In the Crime Control Act of 1990, Pub. L. No. 101-647, Tit. XXV, § 2509, 104 Stat. 4863, Congress added the following provisions to 18 U.S.C. 3663(a):

> (2) For the purposes of restitution, a victim of an offense that involves as an element a scheme, a conspiracy, or a pattern of criminal activity means any person directly harmed by the defendant's

---

[4] As noted earlier, note 2, *supra*, the court of appeals found it unnecessary to decide whether *Hughey* applied to a "scheme" offense or to a restitution order imposed as a condition of probation under the Federal Probation Act. Other courts of appeals, however, have held—correctly, in our view—that *Hughey* does not apply in those circumstances. See *United States* v. *Duvall*, 926 F.2d 875, 876-877 (9th Cir. 1991); see also, *e.g.*, *United States* v. *Stouffer*, 986 F.2d 916, 928 (5th Cir. 1993); *United States* v. *Brothers*, 955 F.2d 493, 496-497 (7th Cir.), cert. denied, 113 S. Ct. 142 (1992). But see, *e.g.*, *United States* v. *Cronin*, 990 F.2d 663, 666 (1st Cir. 1993).

criminal conduct in the course of the scheme, conspiracy, or pattern.

(3) The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement.

The effect of those provisions is to ensure that, in future criminal cases governed by the amendment, defendants who are convicted of "scheme" offenses, such as mail fraud, may be ordered to pay restitution to any person directly injured by the defendant's crimes. Thus, the underlying legal issue raised by petitioner is of no continuing importance. Furthermore, there is no indication that a large backlog of cases remains in the criminal justice system involving defendants whose restitution orders would be subject to challenge under petitioner's interpretation of *Hughey*.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

RICHARD A. FRIEDMAN
Attorney

SEPTEMBER 1993

---

[5] As the court of appeals noted, Pet. App. A78-A79 n.23, assuming *arguendo* that *Hughey* applied to petitioner's situation and should be applied retroactively, petitioner would face a number of obstacles to recovering his restitution payments either from the government, which was a mere conduit for transferring the restitution to the victims, or from the victims themselves.